Norihan bt Talib & Ors v Mohd Nasir bin Hassan & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-02(NCvC)(W)-1175–06 OF 2022
LEE SWEE SENG, MARIANA YAHYA AND AZMI ARIFFIN JJCA
27 OCTOBER 2023

Civil Procedure — Appeal — Notice — Notice of motion — Application to cease acting as solicitors — Application to strike out appellants as parties in appeal — Application for extension of time to serve record of appeal — Application to strike out appeal — Application for stay of proceeding — Inherent jurisdiction of court — Whether special circumstances established — Whether applications ought to be allowed — Rules of Court 2012 O 64 r 5 — Rules of the Court of Appeal 1994 rr 103 & 104

The respondents had filed an action against the appellants on behalf of themselves as agents of the appellants and 415 other claimants for the return of the respondents' monies deposited in the appellants' investment scheme. The respondents' suit was founded on fraud, conspiracy to defraud, cheating and misappropriation of funds against the appellants. The High Court found in favour of the respondents, hence, the present appeal. In this appeal, there were five notices of motion filed by the relevant parties as followed: (a) encl 102 which was filed by Messrs Khalif Isaac Lee to cease acting as the solicitors for the eighth, ninth and tenth appellants pursuant to O 64 r 5 of the Rules of Court 2012 and/or the inherent jurisdiction of the court; (b) encl 104 which was filed by the first to seventh appellants to strike out the eighth, ninth and tenth appellants as appellants in this appeal pursuant to the inherent jurisdiction of the court; (c) encl 109 which was filed by the appellants for an extension of time to serve record of appeal to the respondents through their solicitors pursuant to the inherent jurisdiction of the court; (d) encl 111 which was filed by the appellants for a stay of proceeding pursuant to the inherent jurisdiction of the court; and (e) encl 120 which was filed by the respondents to strike out and/or set aside the appellants' appeal pursuant to rr 103 and 104 of the Rules of the Court of Appeal 1994.

Held:

(1) The court allowed encl 102 with no order as to costs because the respondents raised no objection against this application. In relation to the application to strike out the eighth, ninth and tenth appellants from this appeal under encl 104, the court allowed this application with no order as to costs because the eighth, ninth and tenth appellants had been dissolved by the registrar of companies (see paras 61–62).

(2) For encl 109, although there was some delay in making the application, nonetheless, the court found no serious prejudice caused which could not be compensated by cost. The respondents' solicitor did not make any application to strike out until an application was made by the appellants' solicitor for the extension of time to file and serve the record of appeal where it was undeniable that the record of appeal had been served by email earlier. The court therefore made an order in terms of the application with costs of RM5,000 to be paid to the respondents subject to allocatur fees of 4% of the costs awarded. Consequently, encl 120 was dismissed with no order as to costs (see para 64).

(3) In an application for a stay, it was trite law that the applicant/appellants had a legal burden to show special circumstances to justify the grant of a stay of execution and all the reasons must be deposed in the affidavit filed in support of the application. In the present case, the court found that there were no special circumstances to justify a stay of this appeal merely on the ground that the appellants here had filed a fresh suit in the Kuala Lumpur High Court to set aside the judgment entered against them by the Kuala Terengganu High Court which the appellants were appealing to this court. The principle in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, did not apply in this case as it was not the question of the court not having jurisdiction to hear the matter against the appellants here. The justice of the case was also not in favor of the appellants. Any argument on judgment wrongly entered could still be canvased on appeal. Hence, the court dismissed encl 111 with costs of RM5,000 to the respondents subject to allocatur (see paras 66 & 72–73).

[Bahasa Malaysia summary

Responden-responden telah memfailkan tindakan terhadap perayu-perayu bagi pihak mereka sendiri sebagai ejen-ejen perayu dan 415 penuntut lain untuk menuntut pengembalian wang responden-responden yang didepositkan dalam skim pelaburan perayu-perayu. Saman responden-responden terhadap perayu-perayu diasaskan atas fraud, konspirasi untuk melakukan fraud, penipuan dan penyelewengan dana. Mahkamah Tinggi memutuskan memihak kepada responden-responden, justeru, rayuan semasa. Dalam rayuan ini, terdapat lima notis usul yang difailkan oleh pihak-pihak yang berkenaan seperti berikut: (a) lampiran 102 yang difailkan oleh Tetuan Khalif Isaac Lee untuk berhenti bertindak sebagai peguam cara bagi perayu kelapan, kesembilan dan kesepuluh menurut A 64 k 5 Kaedah-Kaedah Mahkamah 2012 dan/atau bidang kuasa sedia ada mahkamah; (b) lampiran 104 yang difailkan oleh perayu pertama hingga ketujuh untuk membatalkan perayu kelapan, kesembilan dan kesepuluh sebagai perayu-perayu dalam rayuan ini menurut bidang kuasa sedia ada mahkamah; (c) lampiran 109 yang difailkan oleh perayu-perayu untuk lanjutan masa untuk menyerahkan rekod rayuan

kepada responden-responden melalui peguam cara mereka menurut bidang kuasa sedia ada mahkamah; (d) lampiran 111 yang difailkan oleh perayu-perayu untuk penangguhan prosiding menurut bidang kuasa sedia ada mahkamah; dan (e) lampiran 120 yang difailkan oleh responden-responden untuk membatalkan dan/atau mengenepikan rayuan perayu menurut k 103 dan k 104 Kaedah-Kaedah Mahkamah Rayuan 1994.

Diputuskan:

(1) Mahkamah membenarkan lampiran 102 tanpa perintah mengenai kos kerana responden-responden tidak mengemukakan bantahan terhadap permohonan ini. Berhubung dengan permohonan untuk membatalkan perayu kelapan, kesembilan dan kesepuluh daripada rayuan ini di bawah lampiran 104, mahkamah membenarkan permohonan ini tanpa perintah mengenai kos kerana perayu kelapan, kesembilan dan kesepuluh telah dibubarkan oleh pendaftar syarikat (lihat perenggan 61–62).

(2) Bagi lampiran 109, walaupun terdapat sedikit kelewatan dalam membuat permohonan, namun, mahkamah mendapati tiada kesan prejudis serius yang tidak boleh dibayar pampasan melalui kos. Peguam cara responden-responden tidak membuat apa-apa permohonan pembatalan sehinggalah permohonan dibuat oleh peguam cara perayu-perayu untuk lanjutan masa bagi memfailkan dan menyerahkan rekod rayuan di mana tidak dapat dinafikan bahawa rekod rayuan telah diserahkan melalui emel sebelum ini. Oleh itu, mahkamah membuat perintah seperti dipohon dengan kos RM5,000 yang perlu dibayar kepada responden-responden tertakluk kepada fi alokatur sebanyak 4% daripada kos yang diberikan. Kesannya, lampiran 120 telah ditolak tanpa perintah mengenai kos (lihat perenggan 64).

(3) Dalam permohonan untuk penangguhan, adalah menjadi undang-undang yang mantap bahawa pemohon/perayu-perayu mempunyai beban undang-undang untuk menunjukkan keadaan khas untuk mewajarkan pemberian penangguhan pelaksanaan dan semua alasan mesti dinyatakan dalam afidavit yang difailkan untuk menyokong permohonan. Dalam kes ini, mahkamah mendapati tiada keadaan khas untuk mewajarkan penangguhan rayuan ini semata-mata atas alasan perayu-perayu di sini telah memfailkan saman baharu di Mahkamah Tinggi Kuala Lumpur untuk mengenepikan penghakiman yang dibuat terhadap mereka oleh Mahkamah Tinggi Kuala Terengganu yang mana perayu-perayu merayu kepada mahkamah ini. Prinsip dalam *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, tidak terpakai dalam kes ini kerana tiada persoalan mahkamah tidak mempunyai bidang kuasa untuk mendengar kes terhadap perayu-perayu di sini. Keadilan kes juga tidak memihak kepada perayu-perayu. Apa-apa

A hujah mengenai penghakiman yang dimasukkan secara salah masih boleh dikemukakan semasa rayuan. Oleh itu, mahkamah menolak lampiran 111 dengan kos RM5,000 kepada responden-responden tertakluk kepada alokatur (lihat perenggan 66 & 72–73).]

B **Cases referred to**

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (distd)

International Construction & Civil Engineering Sdn Bhd v Jittra Sdn Bhd & Ors [2018] MLJU 2088; [2018] MLRAU 317; [2018] 1 LNS 1252, CA (refd)

C

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49, CA (refd)

D

Ong Koh Hou @ Won Kok Fong v DA Land Sdn Bhd & Ors [2018] MLJU 778; [2019] 4 CLJ 622, CA (refd)

Legislation referred to

E Rules of Court 2012 O 64 r 5, O 92 r 4

Rules of the Court of Appeal 1994 rr 1A, 18, 18(4), 102, 103, 104, 105

Appeal from: Civil Suit No TA-22NCVC-23–06 of 2015 (High Court, Kuala Terengganu)

F

Jeremy Khalif Lee Pheng Yau (with Olivia Lee Yee Teng) (Khalif Isaac Lee) for the appellants.

Mohd Shahril bin Madisa (Shahrul Hamidi & Haziq) for the respondents.

G **Azmi Ariffin JCA:**

INTRODUCTION

[1] There are five separate notice of motion filed before this honourable H court for us to decide. They are as follows:

(a) encl 102 dated 23 June 2023 is Messrs Khalif Isaac Lee notice of motion to cease acting as the solicitors for the eighth, ninth and tenth appellants pursuant to O 64 r 5 of the Rules of Court 2012 and/or the inherent I jurisdiction of the court;

(b) encl 104 dated 23 June 2023 is the first to seventh appellants notice of motion to strike out the eighth, ninth and tenth appellants as appellants in this appeal pursuant to the inherent jurisdiction of the court;

(c) encl 109 dated 27 July 2023, is the appellants/defendants' notice of motion for an extension of time to serve record of appeal to the respondents/plaintiffs' through their solicitors, Messrs Shahrul Hamidi & Haziq pursuant to the inherent jurisdiction of the court;

(d) encl 111 dated 27 July 2023 is the appellants/defendants' notice motion for a stay of proceeding pursuant to the inherent jurisdiction of the court; and

(e) encl 120 dated 30 August 2023 is the respondents/plaintiffs' notice of motion to strike out and/or set aside the appellants/defendants' appeal pursuant to rr 103 and 104 of the Rules of the Court of Appeal 1994.

[2] For ease of reference, the appellants/defendants shall be hereinafter referred to as the appellants, and the respondents/plaintiffs shall be hereinafter referred to as the respondents in this judgment.

THE SUIT

[3] The respondents had filed this action against the appellants on behalf of themselves and 415 claimants for the return of the respondents monies deposited in the appellants' investment scheme.

[4] The basis of the respondents' claim is based on their capacity as agents and/or representatives to the appellants in respect of an insurance investment scheme provided by the appellant for the year 2009. The scheme is based on a profit-sharing business whereby investors or anyone who buys the insurance from the appellants and/or its agents or representatives are entitled to receive a portion of commission received by the insurance agent. The respondents' suit was founded on fraud, conspiracy to defraud, cheating and misappropriation of funds against the appellants.

BRIEF FACTS

[5] It is pertinent to set out briefly the chronology of events and facts in order to appreciate the factual matrix of the case.

[6] Sometime in 2009, 1the first appellant introduced and sells a scheme of 'Perniagaan Perkongsian Keuntungan' where she architected the concept of 'komersialkan komisyen' or commercialising commission that allows investors to receive part of the insurance agent's commission. This scheme allegedly used products of a licensed insurance company, Amlife Insurance Bhd and/or MCIS Zurich as tools to gain profits and misappropriate the respondents' and 415 claimants' monies.

[7] There were three phases of the scheme since its inception in 2009. The representations given by the appellants to the respondents and 415 claimants are as follows:

> First module
>
> The 'investors' are required to make an investment in companies owned or individuals controlled by the first appellant or her agents/representatives. However, there are several instances where monies were required paid to individual persons (as instructed by first appellant and/or her agents) who the respondents had discovered that they are investors like the Respondents or persons whom first respondent was indebted to.
>
> Second module
>
> This module introduced the concept 'komersialkan komisyen' through 'Perjanjian Pembelian dan Perniagaan Polisi Insuran' and 'Perjanjian Pembelian dan Perniagaan Polisi Insurans Tambahan'. The investors are made to sign both agreements in advance upon making their first payment for the scheme.
>
> Third module
>
> The appellants introduced 'Perjanjian Usahasama Pewujudan Pelan Perlindungan dan Persaraan' that embodied the terms of the agreements used in second module with minor amendments and additional terms.

[8] For the purpose of promoting and marketing the scheme, the appellants used their investors (including the respondents and 415 claimants here) to market and sell the scheme under the concept of direct selling. The investors are given a marketing kit to sell the scheme and receive monies from other investors or potential investors. These marketing agents termed as 'services sales' or 'pencadang' are given briefings, trainings and commission as form of motivation.

[9] The first appellant had also conducted a seminar and/or talk in marketing and promoting the scheme. The appellants' employees were also taught and trained to market and promote the scheme.

[10] At all material times, the first appellant had directed her employees and services sales on how to promote and market the scheme. The employees and the services sales were instructed to brief the investors on the following:

(a) the concept of 'perkongsian keuntungan' or 'komersialkan komisyen';

(b) the monthly profit promised under the scheme 4% per month for investment below RM100,000 and 5% per month for investment above RM100,000;

(c) the first appellant was a well-known insurance agent who received numbers of awards by the insurance company and a successful agency owner;

(d) the insurance agents under the first appellant's insurance agency were also successful insurance agents who received numerous awards by the insurance company;

(e) the investment was backed by written agreement entered between the investor and the appellant (through its companies);

(f) the agreements were witnessed by a senior lawyer (tenth appellant) with almost 20 years of experience; and

(g) the scheme was related to and involving a purchase of an insurance policy by a well-established insurance company, AmLife Insurance Bhd and MCIS Zurich.

[11] In order to get more investors into the scheme, the appellants used or involved the existing investors to promote and bring in investors by promising an introducer's commissions.

[12] The services sales are promised commission at the rate of 1% from the capital invested by the investor for a period of 12 months. This is to ensure that the services sales were motivated to bring in more investors into the scheme. The first, second respondent and Ismadi bin Hashim were appointed as services sales for the appellants to promote the scheme.

[13] Towards the end of June 2013, the first appellant to ninth appellant had stop paying or failed to continuously pay commissions/profits to the investors including the respondents and 415 other claimants either commission received from the investment or commission as 'services sales'.

[14] The respondents and other claimants had contacted and demanded payment of their commissions from the first appellant to ninth appellant (or their other agents and representatives) which was futile.

[15] Alarmed by this, the respondents and other claimants continued to chase and demand for payment of their commission either individually, collectively or through representatives but this too had failed.

[16] The appellants in justifying the non-payment of the commissions/profits gave the investors (the respondents and 415 claimants) the following excuses:

(a) the appellants' companies were having problem but it was never informed on the nature of the problem;

(b) the appellants companies were having problem with the system;

(c) the appellants were having crisis in the companies;

(d) the appellant companies were audited and that the payment of the commissions/profits will continue once the audit process is competed; and

(e) the appellants companies were in the process of updating and renew their system and that the payment of commissions/profits will continue once the new system is updated.

[17] To take the point a little further, the appellants (or their agents and representatives) had also asked each of the investors including the respondents and other 415 claimants to fill in a complaint form. The respondents and 415 claimants did so, however the commissions were still not paid.

[18] Subsequently, the appellants introduced a settlement agreements acknowledging their liability to the investors including the respondents and 415 claimants which was duly executed. However, to this date, appellants had failed to comply with the terms of the settlement agreements.

[19] The investors including the respondents and 415 claimants had joined effort to demand the return of invested monies and the commission/profits promised from the appellants through 'Jawatankuasa Bertindak Tuntutan Wang Usahasama' which was established with the sole purpose to discuss on the return of the monies and commissions/profits.

[20] The investors including the respondents and 415 claimants pursue their complaints against the appellants to the authorities including the police, Bank Negara and the insurance company.

[21] The respondents had through this effort, discovered that the appellants were operating an unlicensed business through its companies, Tanjung Trading, Syarikat Rejab Trading and Gandingan Wawasan Trading which was found to have been blacklisted by the Bank Negara on 25 July 2014.

[22] It was also discovered that AmLife Insurance Bhd had suspended the first appellant's license as insurance agent and her agency on 20 May 2014. Following the said suspension, AmLife Insurance Bhd had subsequently terminated the first appellant's license as insurance agent and the first appellant's insurance agency (NTB Agencies) on 23 May 2015 and 27 May 2014 respectively.

[23] AmLife Insurance Bhd had also made a public announcement and stated that the appellants (including its related companies) are not and have

never been authorised to represent and/or carry out any business for and/or on behalf of AmLife Insurance Bhd and neither are AmLife Insurance Bhd associated with them in any way.

[24] From the said investigation, the respondents discovered and submitted that the respondents and 415 claimants have been defrauded and deceived by the first appellant to the tenth appellant, jointly and severally, from the scheme 'perniagaan'.

[25] The respondents' had thus filed this action seeking for the return of monies invested by them for the total sum of RM30,139,691.88.

[26] After a full trial, on 26 May 2022, the learned High Court judge had decided in favour of the respondents and make the following orders:

(a) the appellants to pay the respondents and 415 other claimants the overall amount of RM27,123,022.69;

(b) the appellants to account for and disclose all transactions involving respondents' monies from the appellants' accounts, private and joint, for tracking and tracing purposes including and not limited to the transfer or conversion of monies into fixed, private, joint or third-party savings accounts, sale and purchase of movable and immovable properties, purchase of securities, shares and/or insurance coverage and others;

(c) interests at 5%pa for the sum above from the date of this judgment to full realisation;

(d) the appellants counterclaim is dismissed; and

(e) costs of RM60,000 to be paid by the appellants to the respondents.

[27] Aggrieved by the decision, on 24 June 2022 (encl 1) the appellants filed an appeal to the Court of Appeal.

[28] Via a case management notice dated 28 June 2022, the Court of Appeal had reminded the appellants to file a complete record of appeal within a period of 90 days from the date of which the decision appealed against was given, in which on or before 26 August 2022.

[29] The appellants had submitted a copy of the draft index of record of appeal to the respondents' solicitors on 8 August 2022.

[30] The respondents had replied and approved (with amendments) the said draft index of record of appeal on 10 August 2022.

[31] As at 26 August 2022, the respondents did not receive any copy of the record of appeal from the appellants after the 90 days period has lapsed.

[32] During a case management on 6 September 2022, the respondents has informed the Court of Appeal that the appellants had failed to file the record of appeal within time and that the respondents is objecting to any filing of the record of appeal out of time. The appellants informed the Court of Appeal that the delay in filing the record of appeal is due to the overwhelming number of documents to be prepared and complied in the record of appeal.

[33] On 26 September 2022, the appellants filed encl 3 for an extension of time to file and serve the record of appeal.

[34] Simultaneously, the respondents had filed encl 5 to strike out and/or set aside this appeal due to non-compliance to the rules.

[35] The encl 3 and encl 5 were heard together and on 9 November 2022 the Court of Appeal had allowed for an extension of time for the appellants to file and serve the record of appeal on or before 29 November 2022.

[36] However, as at 29 November 2022, the respondents has yet been served with the record of appeal.

[37] On 6 December 2022, this appeal was called for a case management and the respondents had raised the objection that the appellant had failed to comply with the Court of Appeal order dated 9 November 2022.

[38] During the case management, the appellants were silent on the objection and only later that day, at around 6.16pm, the respondents' solicitors received the electronic copies of the record of appeal via email. However, the physical copies of the record of appeal were never served to the respondents or their solicitors to this day.

[39] The appellants at all material times were represented by Messrs Azri Hazrani & Associates.

[40] On 10 January 2023, Messrs Azri Hazrani & Associates via encl 93 had filed a notice of motion to cease from acting for the appellants for failing to get instructions and cooperation's from the appellants regarding the appeal.

[41] On 7 April 2023, the Court of Appeal allowed Messrs Azri Harzani & Associates notice of motion (encl 93) to cease acting as the appellants' solicitors.

[42] On 15 June 2023, Messrs Khalif Issac Lee were appointed as the appellants' solicitors to act for and on behalf of them in this appeal. A

[43] On 16 June 2023, Messrs Khalif Issac Lee attended to the case management of this appeal before the deputy registrar. During the case management, the respondents' solicitors raised an objection that the record of appeal was served on the respondents' solicitors on 6 December 2022 which is not in compliance with the Court of Appeal order dated 9 November 2022. B

[44] On 19 June 2023, Messrs Khalif Issac Lee wrote to Messrs Azri Harzani & Associates to enquire whether the record of appeal was served on the respondents' solicitors in compliance with the Court of Appeal order dated 9 November 2022. C

[45] On 20 June 2023, Messrs Azri Harzani & Associates responded that the record of appeal was filed in the Court of Appeal on 25 November 2022 and the record of appeal was served on the respondents' solicitors on 6 December 2022. D

[46] On 20 June 2023, Messrs Khalif Issac Lee, and the first to seventh appellants, discovered for the first time through Companies Commission of Malaysia ('CCM') search results done by Messrs Khalif Issac Lee, that the eighth to tenth appellants had, prior to the judgment under appeal and at the commencement of the present appeal before us, been dissolved by the Registrar of Companies. E F

[47] The eighth appellant was dissolved by the Registrar of Companies on 8 June 2018.

[48] The ninth appellant was dissolved by the Registrar of Companies on 3 August 2020. G

[49] The tenth appellant was dissolved by the Registrar of Companies on 26 November 2019. H

[50] Following from such discovery, Messrs Khalif Issac Lee filed a notice of motion in encl 102 dated 23 June 2023 for an order ceasing to act as solicitors for the eighth to tenth appellants and the first to seventh appellants filed a notice of motion in encl 104 dated 23 June 2023 to strike out the eighth to tenth appellants in this appeal. I

[51] In this regard, the first to seventh appellants had instructed Messrs Khalif Issac Lee to file a fresh action specifically to set aside the judgment under appeal in the Kuala Terengganu High Court.

[52] On 5 July 2023, Messrs Khalif Issac Lee wrote to the respondents' solicitors, Messrs Shahrul Hamid & Haziq to confirm whether they have instruction to accept service of the fresh action.

[53] On 6 July 2023 Messrs Shahrul Hamid & Haziq wrote to Messrs Khalif Issac Lee to inform that they will seek the respondents' instructions.

[54] On 11 July 2023, Messrs Khalif Issac Lee wrote to Messrs Azri Harzani & Associates stating that the record of appeal was not filed and served in compliance with the Court of Appeal's order dated 9 November 2022.

[55] On 12 July 2023, the first to seventh appellants commenced Kuala Lumpur High Court Civil Suit WA 22NCvC-370–07 of 2023 ('new suit') against the respondent to set aside the judgment under appeal.

[56] On 18 July 2023, Messrs Shahrul Hamid & Haziq wrote to Messrs Khalif Issac Lee to inform that they do not have instructions to accept service of the new suit for and on behalf of the respondents.

[57] On 27 July 2023, the appellants' filed notice of motion in encl 111 to stay the judgment under appeal on the ground that the said judgment is a nullity because it was entered against the first to seventh appellants as well as the eighth to tenth appellants who did not exist at the time the judgment under appeal was entered so that there is no risk of inconsistent decisions being made by the Court of Appeal in this appeal and the High Court in the new suit. In addition,it was said that there will be no prejudice caused by the stay of this appeal pending the full and final determination of the new suit.

[58] On 30 August 2023, the respondents filed a notice of motion in encl 120 to strike out and/or set aside the appellants notice of appeal dated 24 June 2022 against the decision given by the Kuala Terengganu High Court on 26 May 2022.

THE RELEVANT PROVISION OF LAWS

[59] The law applicable are as follows:

(a) O 64 r 5 of the Rules of Court 2012 states:

5 Application by solicitor that he has ceased to act (O 64 r 5)

(1) Where a solicitor who has acted for a party in a cause or matter has ceased so to act and the party has not given a notice of change in accordance with rule 1, or a notice of intention to act in person in accordance with rule 3, the solicitor may apply to the Court for an order declaring that the solicitor has ceased to be the solicitor acting for the party in the cause or matter, and the Court or the Court of Appeal or Federal Court, as the case may be, may make an order accordingly, but unless and until the solicitor serves on every party to the cause or matter (not being a party in default as to entry of appearance) a copy of the order, he shall, subject to the foregoing provisions of this Order, be considered the solicitor of the party till the final conclusion of the cause or matter, whether in the Court or the Court of Appeal or Federal Court.

(b) r 103 of the Rules of the Court of Appeal 1994 states:

103 Application to set aside for irregularity when allowed

No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

(c) r 104 of the Rules of the Court of Appeal 1994 states:

104 Objections of irregularity

When an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion.

(d) r 102 of the Rules of the Court of Appeal 1994 (Tab 2 RBOA) provides as follows:

102 Non-compliance with Rules not to render proceedings void

Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

(e) r 105 of the Rules of the Court of Appeal 1994 states:

105 Inherent powers of the Court

For the avoidance of doubt, it is declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

(f) O 92 r 4 of the Rules of Court 2012:

4 Inherent powers of the Court

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any

order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

(g) r 18 of the Rules of the Court of Appeal 1994 states:

18 Memorandum of appeal

(1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.

(2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

(3) The memorandum of appeal shall be substantially in Form 3 in the First Schedule.

(4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including —

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given which may be recorded wholly or partly by mechanical means;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal; and

(f) a copy of the notice of appeal.

(5) The memorandum of appeal and the copies of the documents specified in subrule (4) shall be clear and legible. The Registrar may reject any memorandum and the copies of the said document, if in his opinion they are not clear or illegible.

(6) A draft index of the documents to be included in the record of appeal shall be sent by the appellant's solicitors to the solicitors for the respondent who or (if more than one) any of whom may within forty-eight hours object to the inclusion or exclusion of any document. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the High Court

who may require the parties to attend before a Judge of the said Court. The Registrar of the High Court as well as the parties shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal taking special care to avoid the duplication of documents and unnecessary repetition of headings and other merely formal parts of documents. Where in the course of preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on its being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

(7) The memorandum and copies referred to in subrule (4), which together shall be called the record of appeal, shall be filed at the Registry within ninety days from the date on which the decision appealed against was given.

(7A) Notwithstanding subrule (7), if any copy of the documents specified in paragraph (4)(b), (d) or (e) is not available within ninety days from the date on which the decision appealed against was given, the appellant shall file the copy of the documents together with the memorandum of appeal as supplementary records of appeal within three weeks of being notified of its availability.

(7B) Notwithstanding subrules (7) and (7A), if any copy of the documents specified in paragraph (4)(b) or (e) is not available after ninety days from the date on which the decision appealed against was given, the court may order the appellant to proceed with his appeal.

(8) Sufficient copies of the record of appeal for the use of the Judges of the Court shall be sent to the Registrar when the record of appeal is filed.

(9) The appellant shall within the time limited for the filing of the record serve a copy thereof on each party who has been served with the notice of appeal.

(10) The appellant shall, when filing his record of appeal in the Registry, submit to the Registrar a chronology of events from the date the action or the application was filed in the High Court to the date of filing of the record of appeal in the Registry.'

(h) r 18(4) of the Rules of the Court of Appeal 1994 states:

18 Memorandum of appeal

(4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including —

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given which may be recorded

wholly or partly by mechanical means;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal; and

(f) a copy of the notice of appeal.

(i) r 1A of the Rules of the Court of Appeal 1994 states:

1A Court or Judge shall have regard to justice

In administering any of the Rules herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

OUR DECISIONS

[60] This is our unanimous decision.

[61] We will first deal with encl 102. The respondents raised no objection to Messrs Khalif Isaac Lee notice of motion. Hence, we allowed encl 102 with no order as to costs.

[62] For enclosure 104, which is an application to strike out appellant eighth, ninth and tenth from this appeal. We allowed the motion to strike out appellant No eighth, ninth and tenth as it has been dissolved by the Registrar of Companies. No order as to costs.

[63] Enclosures 109 and 120 shall be dealt together as they are interrelated. Application for encl 109 is the appellants notice of motion for an extension of time to serve record of appeal to the respondents and encl 120 is the respondents application to strike out the appellants appeal.

[64] For encl 109, although there was some delay in making the application, but we find no serious prejudice caused which can't be compensated by cost. The respondents solicitor did not make any application to strike out until an application is made by the appellants solicitor for the extension of time to file and serve the record of appeal where it is undeniable that the record of appeal

had been served by email earlier. We therefore, make an order in terms for the application with cost of RM5,000 to be paid to the respondents subject to allocatur fees of 4% of the costs awarded. Respondingly, encl 120 is dismissed with no order as to costs.

[65] Finally, encl 111 is the appellants stay application.

[66] In an application for a stay it is trite law that the applicant/appellants have a legal burden to show special circumstances to justify the grant of a stay of execution and all the reasons must be deposed in the affidavit filed in support of the application.

[67] Before we turn to the findings of this honourable court, we find it necessary to begin by examining the various cases decided on stay application.

[68] The Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 had this to say:

> As Ian HC JC (as he then was) said in *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and Another Case* [1993] 4 CLJ 98 at pp 101–102:
>
> > An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1996] 1 MLJ 86 viz:
> >
> > > Special circumstances as the phase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual usual or common.
> > >
> > > The definition only serves to emphasise the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what the discretion is all about.
> > >
> > > It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances.

[69] In *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49, the Court of Appeal held that:

A ... the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).

B **[70]** In the case of *Ong Koh Hou @ Won Kok Fong v DA Land Sdn Bhd & Ors* [2018] MLJU 778; [2019] 4 CLJ 622, the Court of Appeal has held as follows:

(1) Section 73 of the CJA states that an appeal shall not operate as a stay of execution or of proceeding under the decision appealed from unless the court below of the
C Court of Appeal so orders and no intermediate act or proceedings shall be invalidated except so far as the Court of Appeal may direct. It is a cardinal rule that where a party is exercising his right of appeal, the court ought to ensure that the appeal, if successful, l is not nugatory. However, the scope of this rule has vastly been restricted by judicial fetters rather than rules of the court. Section 73 of the CJA states that the judgment of the High Court is enforceable unless the High Court or
D Court of Appeal orders otherwise. In practical terms, it means the High Court, on its own motion, can grant a stay and if a stay is not successful, the Court of Appeal can do so. The section itself does not say that there must be special circumstance shown before the stay is granted.

E (2) There is an absolute discretion under s 44 of the CJA whether or not to grant a stay. The exercise of the discretion must not be arbitrary and, at the same time, there need not be any minute consideration of allegation of both sides at this stage, as the whole purpose of a s 44 stay is to preserve the integrity of a statutory appeal and, in consequence, the special circumstance rule plays a lesser role in such application.
F The court, as far as practical, must lean towards the appellant, in a bona fide application for a stay, and in a fit and proper case can be on terms, where the court is doubtful that it may be a frivolous application. If the application for stay is indeed frivolous, it must be dismissed at limine. The simple test set out in s 44 of the CJA relates to whether the true purpose of the stay is to preserve the integrity of the appeal.

G ... In *Equiticorp Holdings Ltd v United Securities Sdn Bhd* [2007] 6 CLJ 268, the Court of Appeal observed:

Now, it is well established that the grant or refusal of a stay pending appeal is a matter within the discretion of the court. The purpose of a stay is to preserve the
H integrity of an appeal. See *Jesasu Pte Limited v Minister for Mineral Resources* [1987] NSWJB 207.

[71] In the case of *International Construction & Civil Engineering Sdn Bhd v Jittra Sdn Bhd & Ors* [2018] MLJU 2088; [2018] MLRAU 317; [2018] 1
I LNS 1252 where it was held that:

[15] It is now well established that the court will not exercise its inherent jurisdiction to stay a proceeding unless there are extremely compelling reasons to do so and not merely on the grounds of what is often referred to as 'interest of justice', etc. The strict rule in vogue is that once an action is filed, it must proceed

expeditiously. The threshold to seek a stay of proceedings is very high in cases before the trial court. Very importantly, if the bona fide of the application is in doubt, a stay application must be dismissed in limine.

[72] We have perused and analysed all parties cause papers, read the written submissions and heard their oral submissions. We find that there are no special circumstances to justify a stay of this appeal merely on the ground that the appellants here had filed a fresh suit in the Kuala Lumpur High Court to set aside the judgment entered against them by the Kuala Terengganu High Court which the appellant are appealing to this court. The principle in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, does not apply in this case as it is not the question of the court not having jurisdiction to hear the matter against the appellant here. The justice of the case is also not in favor of the appellant. Any argument on judgment wrongly entered can still be canvas on appeal.

[73] Hence, the motion for stay is dismissed with cost of RM5,000 to the respondent which is subject to allocatur. All cost ordered shall be paid within 14 days from today.

Order accordingly.

Reported by Dzulqarnain Ab Fatar